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**Honorable Rosanna M. Peterson**

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

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| ELVIS RUIZ FRANCISCO JAVIER, CASTRO and EDUARDO MARTINEZ,<br><br>Plaintiffs,<br><br>v.<br><br>MAX FERNANDEZ and ANN FERNANDEZ, a Marital community; and WESTERN RANGE ASSOCIATION, a foreign nonprofit organization,<br><br>Defendants. | Case No. 2:11-cv-03088-RMP<br><br>DEFENDANT WESTERN RANGE ASSOCIATION'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT |

Defendant Western Range Association ("WRA") submits the following brief in response to Plaintiffs' Motion for Partial Summary Judgment, Dkt No. 140, and Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, Dkt No. 141.

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## I. Introduction

WRA was not a joint employer of Plaintiffs. WRA is a non-profit organization that was created to facilitate compliance with the H-2A temporary agricultural program ("H-2A program") for its members. Due to the regulatory requirements of the H-2A program, WRA must be listed as a joint employer of workers *for purposes of the H-2A program only*. This distinction is critical in this case: Plaintiffs' claims arise under the Fair Labor Standards Act ("FLSA"), not the H-2A program.

Through their focus on WRA's efforts to ensure its members comply with the H-2A program, Plaintiffs appear to suggest that any entity that facilitates placement of H-2A workers is automatically a joint employer for purposes of the FLSA. Through its early guidance and recent decision finding that the economic realities weighed against finding WRA was a joint employer, the United States Department of Labor ("DOL") has recognized that such a view is not supported by its regulations. Instead, *the only test applicable to determining joint employment under the FLSA is the economic realities test*. *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997). In this case, the totality of economic realities clearly demonstrates that WRA lacked the requisite control over Plaintiffs' employment to be considered a joint employer.

WRA merely facilitated its members' compliance with the H-2A program. The only conditions it imposed on the terms of Plaintiffs' employment were designed solely to ensure its members complied with the H-2A program. The DOL recognized this was insufficient, based on the facts of this case, to find that the factors weighed in favor joint employer status on WRA and this Court should too. WRA is not a joint


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employer of Plaintiffs.

## II. WRA Was Created to Facilitate the Employment of H-2A Workers by its Members, Not to Act as the Employer of Such Workers.

WRA is a non-profit organization that was created to enable its members to comply with the complex and confusing H-2A program. It was not designed to be, and in fact, is not the employer of agricultural workers except as required under the H-2A regulations. Understanding the H-2A regulations and special procedures that apply specifically to WRA shows that WRA's role is that of a facilitator for its members rather than as an employer as Plaintiffs allege.

The H-2A temporary agricultural program allows American agricultural employers to employ "nonimmigrant foreign workers" when there is a shortage of domestic workers. 20 C.F.R. § 655.103(a). Employers participating in the H-2A program must meet program requirements which give preference to American workers where possible. *See id.*

WRA meets these program requirements on behalf of its members under special exceptions in the H-2A program. *See* 20 C.F.R. § 655.102. WRA recruits nonimmigrant foreign workers for its members and obtains visas for these foreign workers. *See* 20 C.F.R. § 655.103(a).

Before a nonimmigrant foreign worker will be approved for a visa under the H-2A program, a temporary labor certification must be obtained from the Department of Homeland Security. 20 C.F.R. § 655.130. WRA completes this on behalf of its members, as this is a complex process that involves creating and advertising a master


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job order detailing a single job description covering positions available with every member, advertising the open position to domestic workers, tracking domestic worker responses, and filing the Application for Temporary Employment Certification. 20 C.F.R. § 655.121(a)(2); 20 C.F.R. § 655.131; 20 C.F.R. § 655.152; 20 C.F.R. § 655.156; 20 C.F.R. § 655.130. Once WRA satisfies these requirements, the foreign workers WRA recruits are eligible for H-2A visas. When visas are secured, WRA advances the cost of transportation from the worker's home country to the state where they are employed. Members reimburse these transportation costs to WRA. Peters Depo at 95-97.

WRA's purpose in this process is to facilitate the H-2A procedure for members, and WRA has extremely limited interaction with the foreign worker once they arrive at the ranches and begin work. After a worker arrives, WRA's role is limited to transferring a worker to a different member if needed. WRA is a non-profit organization that exists solely to aid its members in navigating the complex H-2A program to help enable its members' compliance with this complex federal law in obtaining workers for their operations. While as a practical matter WRA's role is that of a facilitator for its members rather than an employer of foreign workers, as discussed below, WRA also does not meet the legal test as an employer under the FLSA and state law.

## III. WRA Does Not Employ H-2A Workers for Purposes of the FLSA or Washington State Law.

Under the FLSA, an employer is any person acting directly or indirectly as


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such in relation to an employee. 29 U.S.C. § 203(e)(1). As Plaintiffs argue, the definition of "employ" should be interpreted expansively to accomplish the remedial purposes of the act; however, the DOL has specifically declined to adopt a "strict liability" standard for defining "joint employment" under the FLSA or other statutes that utilize the same definition as the FLSA. *See* Migrant and Seasonal Agricultural Worker Protection Act, 62 FR 11734-01 ("The Department has very specifically avoided creating 'strict liability' through any regulatory test which would operate based on a presumption that a joint employment relationship exists.") Similarly, the DOL has specifically stated that "WRA operates as a joint employer solely for H-2A program purposes." Exhibit C to Western Range Association's Response to Plaintiffs' Statement of Facts ("WRA Response"), Department of Labor Special Procedures, at 8.[1]

Thus, for purposes of the FLSA and state law, the economic realities test *is the only applicable standard* for determining whether a joint employment relationship exists. *See Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754-55 (9th Cir. 1979); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983); *Torres-Lopez*, 111 F.3d at 639 (9th Cir. 1997); *Anfinson v. FedEx Ground,* 159 Wn. App. 35, 50, 244 P.3d 32 (2010) (joint-employer test under state

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[1] DOL made this statement in an early special procedures guide. While DOL's current guide no longer specifically discusses WRA, DOL's recent decision finding every joint employment factor weighs in favor of WRA clearly demonstrates that DOL still agrees with its earlier guidance on this subject.



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wage claims analyzed under economic realities test).[2]

**A. The *Torres-Lopez* Factors Control the Joint-Employment Analysis.**

*Torres-Lopez* is the seminal case concerning joint employer liability in the 9th Circuit and sets forth the current test for joint employment under the FLSA. *Torres-Lopez*, 111 F.3d at 639-640. Instead of using the controlling *Torres-Lopez* factors, Plaintiffs rely on the more limited set of factors set forth in *Bonnette*. While the *Bonnette* factors are relevant to the Court's analysis, they must be used in conjunction with the more comprehensive set of factors set forth in the *Torres-Lopez* decision. [3]

*Torres-Lopez* examined whether a joint employment relationship existed between a farmer and a farm labor contractor under the FLSA and the Migrant and Seasonal Worker Protection Act ("MSWPA"). The Court noted that the term "employ" has the same meaning under both statutes, and that the concept of joint employment was identical between the FLSA and the MSWPA. *Torres-Lopez*, 111 F.3d at 639. The Court then examined a number of relevant factors determined by the agencies and courts to be the key factors in the joint employment analysis. *Id.* at 640.

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[2] Plaintiffs spend considerable time discussing a decade old statement from an economist. This statement was not directed to the issue of joint employment for FLSA purposes. It should not be viewed as anything more than a confusingly worded statement of WRA's longstanding position that it exists to aid its members in facilitating compliance with the H-2A program, and that it will act as a guarantor of its members' obligations to its workers in the event they go bankrupt. Richins Depo at 253-254. A guarantor is only secondarily liable for the debtor's debt. *See Robey v. Walton Lumber Co.*, 17 Wash. 2d 242, 255, 135 P.2d 95, 101 (1943). As such, a guarantor is not a joint employer for employment law purposes. The joint employment test is the only applicable test for joint employment, and its factors must be analyzed on a case-by-case basis.

[3] Plaintiffs also make much of *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985). However, *Salazar* neglected to employ the controlling economic realities test, and there is no evidence the controlling economic realities test was even briefed or before the court.


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The adoption of the *Torres-Lopez* factors has been recognized by the DOL as the applicable joint employment test under the FLSA. US DOL Report, Dkt No. 133-4 at 3. As a result of a complaint raised by Plaintiffs before filing this action, the DOL analyzed the economic realities of the relationship between WRA, Fernandez, and the workers, and found that each factor in the *Torres-Lopez* case weighed against finding that WRA was a joint employer of Plaintiffs. *Id.*

Application of the more expansive *Torres-Lopez* factors is also consistent with other joint employment cases. Every recent case that has examined the economic realities test has emphasized that no single factor is controlling and the Court's decision must be based upon the totality of circumstances. *Bonnette*, 704 F.2d at 1470; *Torres-Lopez*, 111 F.3d at 639; *see also Real*, 603 F.2d at 754-55; *Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154, 1158 (C.D. Cal. 2003) (examining totality of circumstances and finding manufacturer was not joint employer with garment sewing company under FLSA). Indeed, *Zhao* applied only the *Torres-Lopez* factors to its analysis of the totality of the circumstances under the FLSA, despite discussing *Bonnette*. *Id.* at 1158-1160. *Bonnette* itself stated:

> The four factors considered by the district court provide a useful framework for analysis in this case, but they are not etched in stone and will not be blindly applied. The ultimate determination must be based upon the circumstances of the whole activity.

*Bonnette*, 704 F.2d at 1470 (internal citations omitted). Thus, *Torres-Lopez* provides the correct analysis of joint employment in this case. As shown in WRA's earlier briefing, WRA is not a joint employer under application of the *Torres-Lopez* factors.


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Dkt. No. 131 at 4-8. As such, the *Bonnette* factors should be considered only in addition to those in *Torres-Lopez,* and even these factors show WRA was not a joint employer of Plaintiffs.

### B. Even Considering the *Bonnette* Factors, WRA was not a Joint Employer.

Plaintiffs' application of *Bonnette* contains a number of factual and legal inaccuracies regarding WRA's (non)involvement in Plaintiffs' employment. Under the *Bonnette* test, the Court considers whether the alleged employer 1) had the power to hire and fire the employees; 2) supervised and controlled employee work schedules or conditions of employment; 3) determined the rate and method of payment; and 4) maintained employment records. *Bonnette*, 704 F.2d at 1470. In this case, each of these factors weighs against finding that WRA was a joint employer.

#### 1. WRA Did Not Have the Power to Hire Employees, and Could Only Fire Employees to Extent Necessary to Comply with its H-2A Obligations.

WRA did not have the power to hire any of the workers employed by members, and could only fire employees to the extent necessary to meet its H-2A obligations. Plaintiffs' arguments to the contrary misunderstand WRA's role as a facilitator of member's compliance with the H-2A program. Members tell WRA how many workers they wanted to hire, and WRA recruits and transports the workers to the United States so that its members can hire the workers to work on their ranches.

In their brief, Plaintiffs confuse WRA's compliance with the H-2A regulations and its recruitment activities with the power to hire or fire employees. *See* Dkt No.


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141 at 10-11. WRA does not dispute that they ensured compliance with the H-2A programs in their recruitment of workers to travel to the United States. However, mere recruitment consistent with the H-2A regulations is certainly not akin to the power to hire and fire employees, nor is it what the Court in *Bonnette* meant by the power to hire and fire.

In *Bonnette*, the 9th Circuit found that the defendant agencies had the power to hire and fire home care workers hired by grant recipients based on the fact that the agencies occasionally hired and fired workers when the recipient was unable to, and they also controlled the grant money that these home care workers received as payment. Thus, the court stated "[r]egardless of whether the [agencies] are viewed as having the power to hire and fire, their power over the employment relationship by virtue of their control over the purse strings was substantial." *Bonnette*, 704 F.2d at 1470. In this case, WRA had no degree of control over the workers either through direct participation in hiring or firing decisions or through financial control of the workers. As the DOL stated in looking at the payment and right to hire and fire factors: "Fernandez makes all the decisions involving pay rates above the specified amount, pay dates, transportation, and hiring and firing, as well as completing the workers payroll." US DOL Report, Dkt No. 133-4 at 3.

WRA did not participate in the members' hiring or firing process. Plaintiffs discuss at length many of the terms of the H-2A program under which WRA and its members were required to comply. For example, Plaintiffs discuss the pre-employment agreement, which contains a number of provisions required by the H-2A


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program to notify potential workers of their rights and responsibilities under the program. Dkt. No 146-6 at 1 (Pre-employment agreement). Among these provisions are a required notification that the workers are subject to transfer. *Id.* The H-2A program requires that employers guarantee three-quarters employment, which often necessitates a transfer in the event an employer no longer has work for the worker or otherwise desires to fire the worker. *See* 20 C.F.R. §655.122(i). Thus, workers are subject to transfer if their employer wants to terminate them or no longer has work for them. Exhibit A to WRA Response, Richins Depo at 43-44. Similarly, Plaintiffs note that workers are to notify WRA if they are terminated by their employer. Dkt No. 146-14 at 2 (Employment Agreement). Again, this provision exists to ensure that workers are transferred to another member in the event they are terminated so that they can receive the guaranteed three-quarters employment.[4] Richins Depo at 149-150. Indeed, the pre-employment agreement specifically states: "You are NOT employed by Western Range Association but by a MEMBER of Western Range Association (WRA)." Dkt. No 146-6 at 1.

Plaintiffs make much of the fact that the employment agreement contains a provision that makes WRA a party to any decision to terminate and allows WRA or the member to terminate the agreement for willful breach. Dkt No. 141 at 11. Dennis Richins, the executive director of Western Range Association, explained that

[4] Plaintiffs confuse WRA's requirement to transfer a worker with the member's ability to fire a worker. Dkt No. 141 at 11. The member DOES have the power to fire the worker from his employment, regardless of whether WRA later reassigns the worker. If WRA later reassigns the worker to another member, that member then hires the worker. At no point is the worker "hired" by WRA – WRA simply acts as the member's facilitator in aiding in its compliance with the H-2A regulations. Richins Depo at 77; 117.


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he did not know why that provision exists.[5] Richins Depo at 171-172. As discussed above, WRA has always acknowledged that in order for them to ensure compliance with the H-2A regulations, its members keep WRA informed of termination decisions so that WRA can transfer the worker to a new location upon termination. *See* Richins Depo at 211-212. Further, representatives of WRA indicated that the organization will not itself terminate a worker unless there is a clear violation of the H2-A regulations. Exhibit B to WRA Response, Peters Depo at 118-121; *see also* Richins Depo at 43-44. Otherwise, employment decisions rest solely with the member. *Id.* As Mr. Richins stated, WRA simply does not terminate a member's employee, as both parties usually want out of the employment relationship by the time such a situation arises. Richins Depo at 44. As such, the member will terminate the employee, then WRA can transfer him. *Id.* Put simply, WRA has only very limited rights to fire employees, and it has not exercised those rights in recent memory.

Finally, Plaintiffs claim that WRA's role as a facilitator in the H-2A process somehow is akin to an ability to hire and fire workers. As explained above, WRA simply facilitated the legal process of getting the workers to the United States, where they were then hired by its members.[6] WRA did not itself hire the workers, nor did

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[5] Mr. Richins also correctly noted that such a provision is not binding on the parties to the agreement, as WRA is not a signatory to the agreement. Specifically, Mr. Richins testified:
**Q.** Is that -- since Western Range is not a party to this contract, I suppose it's not really fair to say that they retained the right to terminate the employee?
**A.** Probably not. I don't know why it's there. I couldn't tell you. (Richins Depo at 171)

[6] Indeed, WRA is reimbursed by the members that hire the workers for its cost of transporting the workers to the United States. Peters Depo at 95-97. In *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002), the 11th Circuit held that since transportation costs were primarily incurred for the benefit of the employer, not the worker, they must be reimbursed by the employer


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WRA derive any benefit from the work performed by the workers. Peters Depo at 115-118; Richins Depo at 148. WRA exists simply to facilitate the H-2A process for its members, and does not itself have the ability to hire or fire workers. It does not meet this factor of the *Bonnette* analysis.

**2. WRA Did Not Supervise or Control Any Aspect of the Plaintiffs' Work Schedules or Conditions of Employment.**

WRA did not supervise or control any aspect of the workers' schedules or conditions of employment. Plaintiffs' arguments regarding the degree of control over workers' schedules and conditions of employment completely miss the mark. Instead of focusing on the *actual conditions of Plaintiffs' work*, Plaintiffs focus instead on the form of the workers' agreements with their employers and the ability to transfer workers if they are fired by their employer. Dkt No. 141 at 11-15. In addition to being factually inaccurate, Plaintiffs' arguments are irrelevant to the factors in the *Bonnette* case.

In *Bonnette*, the 9th Circuit made clear that the "control" factor examined the "structure and conditions of employment," including the number of hours each worker would work, and exactly what tasks would be performed. *Bonnette*, 704 F.2d at 1470. This factor was thoroughly discussed in both *Torres-Lopez* and *Zhao*. In *Torres-Lopez*, the 9th Circuit examined control over the following items in examining

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in the first paycheck if failure to reimburse would drive the wage rate below the minimum wage. *Id.* at 1242-1244. In this case, Fernandez, the employer, derived the benefit from hiring the workers, and is the entity that shoulders those costs. Peters Depo at 95-97. Unlike the defendant in *Arriaga*, WRA derives no benefit from the transportation of the workers, and does not itself bear any of the expenses incurred in transporting them to the United States..



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the alleged employer's degree of control: the daily harvest schedule, the number of workers needed for harvest, when harvest occurred, the right to inspect the work, the daily presence of the alleged employer, and the degree of communication with the other employer. *Torres-Lopez*, 111 F.3d at 642. Similarly, the court in *Zhao* examined the alleged employer's supervision of day-to-day management of the employees, who scheduled work, who controlled worker shifts and hours of work, and who was responsible for employee assignments. *Zhao*, 247 F. Supp. 2d at 1160. Based primarily on the lack of control of the manufacturer over the operations of the garment sewing company, *Zhao* concluded that the manufacturer was not a joint employer of the employees even though its agent occasionally inspected the facilities. *Id.*

In WRA's case, each and every factor examined in *Bonnette, Torres-Lopez,* and *Zhao* demonstrates that WRA lacked the requisite control over the workers to be considered a joint-employer. Fernandez, not WRA, controlled the hours each employee worked, the tasks to be performed by each worker, the herding schedule, the number of workers needed for herding, and the day-to-day management of the employees. *See* Richins Depo at 117. Further, each Plaintiff testified that WRA never inspected the work performed by the workers and it was never present at the ranches. *See* Dkt No. 133-2, Castro Depo at 66; Dkt No. 133-3, Martinez Depo at 48; Dkt No. 133-1, Ruiz Depo at 40. Finally, WRA does not communicate with its members about the specific work performed by the worker other than as required under the H-2A program. Richins Depo at 224.


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Plaintiffs' arguments to the contrary attempt to manufacture a relationship between the parties that simply did not exist. For example, Plaintiffs argue that since WRA provided a form sheepherder agreement to its members, it must have had control over the structure of the employment relationship. Dkt No. 141 at 12. While WRA did provide a form sheepherders agreement for its members to use, it did so simply to ensure that the agreement complied with the H-2A regulations, not to exercise control over the employment relationship. *See* 20 C.F.R. § 655.122.

Similarly, Plaintiffs again misunderstand the purpose of WRA's ability to reassign workers that have been fired by one of its members. Dkt No. 141 at 12-14. WRA may reassign the workers when they are fired by a member for any number of reasons – there is no more work for the worker, the worker has expressed concerns about the employer, etc. Peters Depo at 26, 31-32; Richins Depo at 43-44. WRA cannot prohibit a member from firing a worker; however, since the H-2A regulations require that the workers are paid for three-quarters of the contracted time, WRA will transfer the worker to ensure compliance with the regulations. *See* 20 C.F.R. § 655.122(i); Richins Depo at 149-150. This ability to transfer did not grant WRA any control over the day-to-day work of the worker, nor did WRA have the power to assign specific work to a worker.[7] Peters Depo at 118-120.

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[7] The case Plaintiffs cite in support of their position is unpersuasive. WRA functions nothing like the temporary staffing agency in *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998). In that case, unlike WRA, the workers were the direct employees of the staffing agency – the agency hired and fired the workers, determined the worker's pay, required the workers to submit timesheets, issued the worker's paychecks, and maintained the worker's pay and employment records. *Id. at* 676. As with most temporary staffing agencies, Baystate was the direct employer of the workers, and responsible for all aspects of their work-related activities. In short,



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Finally, while WRA may retain some authority to intervene where problems arise between the member and the worker, WRA's powers are limited to ensuring compliance with the H-2A regulations. While workers may contact WRA in the event a problem arises, WRA will not intervene between the member and the worker if there is such a problem, but will simply transfer the worker if both parties desire it. Richins Depo at 43-44. Further, WRA's power to take action against members who violate employment laws is not related to the employment agreements between the members and the workers, but rather relates to independent agreements with members as a condition of their membership in WRA. *See* Richins Depo at 48-49.

In short, Plaintiffs did not examine any of the actual factors or conditions of work relied on by the Court in *Bonnette*, *Torres-Lopez*, and *Zhao*. Instead, Plaintiffs focus on aspects of the relationship between WRA and its members that are outside the scope of the FLSA economic realities test and are quite simply not relevant to this analysis. It is clear that WRA was merely a facilitator for its members, and did not exercise any control or supervision over the work activities of these workers. WRA does not meet the second factor of the *Bonnette* analysis.

**3. WRA Does Not Determine the Rate or Method of Payment of its Members' Workers.**

WRA does not determine the rate or method of payment of the workers

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the other factors in *Baystate* weighed in favor of finding that Baystate was the employer of the workers, despite the fact that due to the nature of a temporary staffing service, Baystate did not directly supervise the work its employees did each day. In this case, WRA does not function as the workers' direct employer, but rather as a facilitator for its members who handle all aspects of the employment relationship.



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employed by its members. Plaintiffs' arguments to the contrary again focus on factors outside those contemplated by the Court in this analysis, and confuse the requirements of the H-2A program with requirements imposed independently by WRA. In *Bonnette*, the 9th Circuit noted that it was undisputed that the workers' wages were paid for by the agencies – indeed, the funding for the home care worker program came directly from the agencies. *Bonnette*, 704 F.2d at 1470. Conversely, in *Zhao*, the Court refused to find that the manufacturer had control over the payroll records or wages simply because it employed an agent to monitor the garment sewing company's compliance with federal and state labor laws. *Zhao*, 247 F. Supp. 2d at 1160. In this case, it is clear that the rate was determined by the DOL and the method of payment was determined by Fernandez. *See* Dkt No. 146-14 (Employment Agreement); *see also* US DOL Report, Dkt No. 133-4 at 3. The bottom line is that Fernandez was responsible for paying the worker and controlled the method of payment.[8] WRA controlled neither the rate nor the method of payment.

Thus, unlike the agencies in *Bonnette*, WRA did not directly pay the workers or exercise any control over the purse strings – that power rested solely with the members. Like the manufacturer in *Zhao*, WRA simply monitored compliance with federal and state laws, but did not have any direct access or control over the wages paid to the workers. WRA simply required its members to pay the wage required under the H-2A program. Since WRA did not control the method or rate of pay it

[8] Plaintiffs make much of the fact that WRA is a guarantor of its members' payment if the member is in bankruptcy and is unable to pay. WRA's agreement to act as a guarantor in the event of bankruptcy is part of its agreement with its members, and is designed ensure compliance with the H-2A regulations. *See* Richins Depo at 254-255


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does not meet this factor of *Bonnette*.

**4. WRA Did Not Maintain Employment Records for its Herders.**

Plaintiffs cannot seriously argue that WRA maintained employment records for its herders. While Plaintiffs correctly note that WRA maintained copies of visa information, employment contracts, travel information, and transfer records, these records are not "employment records" within the meaning of *Bonnette*. In *Bonnette*, the agencies directly paid for the home care workers, and kept records of documents relating to the *employees' actual employment with the recipients*. *Bonnette*, 704 F.2d at 1470. Similarly, in *Zhao*, the court mentions payroll records as the key employment records in the *Bonnette* analysis. *Zhao*, 247 F. Supp. 2d at 1160. In this case, Fernandez controlled the hours worked by the workers, the method and rate of payment to the workers, and all other key aspects of the employment agreement. As such, Fernandez kept all records of such employment. The records kept by WRA *have nothing to do with the workers' actual employment* with the members – they were simply evidence of the workers' general dates of arrival and departure in the states and the locations where their actual employment records can be found. Peters Depo at 37. WRA did not keep employment records within the meaning of *Bonnette*, and thus does not meet the fourth factor of the *Bonnette* analysis.

As discussed above, WRA is a mere facilitator for its members to enable their compliance with the H-2A process. WRA is a non-profit organization that exists solely for the benefit of its members. It does not itself supervise, control, or otherwise dictate any aspect of the actual work performed by the workers employed


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by its members. Unlike the employers in *Bonnette* and *Torres-Lopez*, it does not have the ability to hire or fire workers, it does not control any aspect of the work performed by the workers, and it does not participate in payroll or keep payroll or other employment records. Much like the manufacturer in *Zhao*, it simply provides a service for which its members have contracted, and leaves the actual work to its members. As such, WRA does not meet any of the four factors deemed relevant by the Court in *Bonnette* in the joint employment analysis.

### C. Under the *Torres-Lopez* factors and based on the totality of the economic realities of the circumstances, WRA is not a joint employer of Plaintiffs.

As discussed at length in WRA's Memorandum in Support of Summary Judgment, application of the Torres-Lopez factors clearly demonstrates that WRA was not a joint employer with Fernandez for purposes of the FLSA. Dkt. No. 131 at 4-8. Rather than reargue the points raised in WRA's earlier briefing, the points are summarized as follows: Fernandez was Plaintiffs' only employer for FLSA purposes. He told Plaintiffs what work to perform, supervised their work, controlled the method of payment, controlled their work schedule, and work was performed on his ranch using his equipment. In fact, each Plaintiff testified that they never spoke to or saw any WRA representative while they worked for Fernandez. As such, WRA does not meet the test for joint employment set forth in *Torres-Lopez*.

## IV. Plaintiffs' Breach of Contract Claim Fails for Want of a Contract.

WRA did not have an employment contract with the workers. Recognizing this fact, Plaintiffs claim that WRA was a guarantor of the written contract between


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the parties, and thus liable for any breach of contract. Plaintiffs' claim fails. Initially, Plaintiffs point to no provision in the employment agreement that obligates WRA to guarantee the written contract for the benefit of the employee. Plaintiffs only point to a nonbinding, and incomplete, statement of WRA's former economist as support for the proposition that WRA was a joint guarantor of the agreement. At any rate, Washington has recognized that a guarantor must answer for another's debt or default *only in the event of nonperformance by the primary debtholder*. *See Robey v. Walton Lumber Co.*, 17 Wash. 2d 242, 255, 135 P.2d 95, 101 (1943). In this case, there is no allegation that Fernandez is not able to answer for any debts he may have.

Further, WRA agreed to be a guarantor of its members *only in the event they file for bankruptcy*. *See, e.g.,* Richins Depo at 255. Where the guaranty is conditional, the obligation of the guarantor may not be enforced unless the event has occurred or the act has been performed. *Robey*, 135 P.2d at 102. Since Fernandez has not filed for bankruptcy, that guarantee is not at issue here. WRA is not a party to the employment agreement between Fernandez and Plaintiffs, and certainly does not guarantee its terms. As such, WRA cannot be liable to the extent Fernandez breached the employment agreement.

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## V. Conclusion

Based on the foregoing, Plaintiffs' Motion for partial Summary Judgment should be denied.

Dated: January 14, 2013.

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# CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2013, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system and caused it to be served by mail to the following:

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Dated: January 14, 2013.

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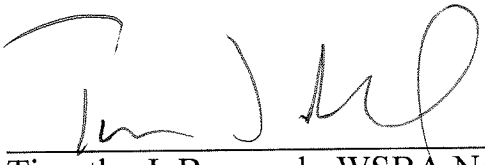

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